

D.P.U. 91-DS-46

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by Brockton Excavating Contractors, Inc.

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APPEARANCES: Richard McLaughlin, President  
Brockton Excavating Contractors, Inc.  
P.O. Box 2115  
Brockton, Massachusetts 02403  
FOR: BROCKTON EXCAVATING CONTRACTORS, INC.  
Respondent

Mario Reid, Compliance Officer  
Gail Soares, Dig-Safe Investigator  
Division of Pipeline Engineering and Safety  
Department of Public Utilities  
Boston, Massachusetts 02202  
FOR: THE DIVISION OF PIPELINE  
ENGINEERING AND SAFETY

## I. INTRODUCTION

On July 3, 1991, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Brockton Excavating Contractors, Inc. ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on June 13, 1991 at 173 Oliver Street, Boston, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions, causing damage to an underground service line by Boston Edison Company ("Boston Edison" or "Company"). The NOPV also stated that the Respondent had the right to either appear before a Department hearing officer in an informal conference on August 6, 1991, or send a written reply to the Department by that date.

On August 6, 1991, the Respondent met with the Division during an informal conference. In a letter dated December 11, 1991, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. On December 18, 1991, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on October 6, 1992 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq.

At the hearing, Mario Reid, a compliance officer for the Division, and Gail Soares, a Dig-Safe investigator, appeared on behalf of the Division. John A. Kingston, a general metropolitan supervisor for the Boston Edison, testified in behalf of the Division. Richard

McLaughlin, president of the Brockton Excavating Contractors, Inc., testified for the Respondent.

All exhibits offered were moved into evidence by the Department.

## II. SUMMARY OF FACTS

### A. The Division's Position

The Division alleges that the Respondent failed to use reasonable precautions while excavating at 173 Oliver Street in Boston, which resulted in damage to an underground duct bank containing electric cables (Tr. at 5, 82; Exh. D-1).

In support of this allegation, the Division stated that the Respondent had rendered proper Dig-Safe notification on May 14, 1991 (Tr. at 6; Exh. D-2). Mr. Kingston testified that the Company marked the appropriate site on May 16, 1991 (Tr. at 14; Exh. D-2). The Division contended that the area requested to be marked by the Respondent was clearly marked when the Respondent began excavation (Tr. at 5, 82-84).<sup>1</sup> Therefore, because the site was properly marked and damage occurred, the Division contended that the Respondent did not use reasonable precautions (id. at 5).

### B. The Respondent's Position

Mr. McLaughlin testified that although he did not witness the actual damage to the duct bank, he was on site at 173 Oliver Street just before and after the damage occurred (id. at

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<sup>1</sup> Neither Mr. Reid nor Mr. Kingston stated that they had visited 173 Oliver Street during the period surrounding the damage caused by the Respondent. In fact, when the Respondent's witness stated that he was the only person at the hearing who had visited the site on the night when the damage occurred, neither Mr. Reid nor Mr. Kingston contradicted the Respondent (Tr. at 86, 88). All of their statements and assertions were based on conversations with Company employees who were not called to testify. Therefore, Mr. Kingston's and Mr. Reid's testimony is strictly hearsay and can only be used in the Department's decision to support related evidence.

50-51, 77, 80). Mr. McLaughlin contended that he was the only person at the hearing who had been at the site on the night the damage occurred, and that the Division was "just guessing" about the facts that existed on the site on the night when damage occurred at 173 Oliver Street (id. at 86, 88).

Mr. McLaughlin testified that the original markings situated by the Company were clear, but incorrect (id. at 6, 35, 45, 55, 59, 62). He also testified that the original markings indicated that the duct bank extended across Oliver Street rather than along the side of Oliver Street where they were later found by the Respondent (id. at 29, 44, 59-60). Mr. McLaughlin further testified that the Respondent initially excavated at the site believing that no electric facilities existed in the area of excavation (id. at 77-78).

Mr. McLaughlin stated that during the Respondent's initial excavation, it discovered unmarked Company facilities located along the side of the street rather than across the street as the markings had indicated (id. at 29). Mr. McLaughlin also stated that after the Respondent discovered the unmarked facilities, it contacted the Company and asked it to investigate those facilities (id. at 29, 73-74). He further stated that the Company arrived at the site and properly marked the location of the already exposed and remaining unexposed portions of the facility and informed the Respondent that the facility was "dead" and that no further Company facilities were located in the area of excavation (id. at 29, 45, 50, 68, 73-75). Mr. McLaughlin asserted that the new markings situated by the Company were in direct conflict with its original markings (id. at 29-30).

Mr. McLaughlin stated that shortly after the Company had properly marked the area and informed the Respondent that no further facilities existed in the area of excavation, the Respondent excavated directly beneath the exposed "dead" facilities and damaged a "live" duct bank (id. at 50-51, 73-74, 78, 87-88). Mr. McLaughlin also stated that the Respondent would not have damaged the Company's facility if the Company's original markings had been correct (id. at 60). Mr. McLaughlin further stated that given the existing facts, he did not know of further precautions the Respondent could have taken to avoid damage to underground facilities aside from contacting the Company and asking them to investigate its unmarked facilities (id. at 87-88).

### III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in this area. Several recent cases have established the proposition that using a machine to expose facilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Company, D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990). However in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set

forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp., D.P.U. 91-DS-2 (1992).

A variation in depth does not relieve an excavator from its duty to use reasonable precautions. Fed Corp, supra; Amorello, D.P.U. 89-DS-61 (1990). However, the depth of an underground facility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities. Amorello & Sons, D.P.U. 87-DS-148, at 7-8 (1993); New England Excavating, D.P.U. 89-DS-116, at 6-7 (1993).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating, supra, at 9; Fed. Corp., supra, at 5-6. In specific instances where there has been an allegation of a failure to exercise reasonable precaution without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp, supra; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

#### IV. ANALYSIS AND FINDINGS

The issue to be decided in this case is whether the excavator failed to exercise reasonable precautions to protect underground facilities while excavating.<sup>2</sup>

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<sup>2</sup> Although the Division also alleged that the Respondent failed to maintain markings (Tr. at 83), it did not present any evidence that the Company's markings were not maintained by the Respondent. In fact, the Company's underground damage report notes that the markings were within 18 inches of the facility and made no mention of obliteration or a failure by the Respondent to maintain those markings (Exh. D-1). Accordingly, the  
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In addressing the issue of whether the Respondent used reasonable precautions during excavation, the Division failed to provide examples of precautions that the Respondent could or should have taken. Not only did the Division fail to provide examples of precautions that the Respondent should have taken to avoid damage, but the Division also failed to controvert the Respondent's assertion that the Company provided incorrect information to the Respondent regarding the existence of further facilities at the site.

In specific instances where an allegation of a failure to exercise reasonable precautions has been made without demonstrating further precautions that could or should have been taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Fed. Corp., supra; Albanese Brothers, Inc. v. Colonial Gas Company, D.P.U. 88-DS-7 (1990). Adequate support or evidence must accompany any allegation that an excavator failed to exercise reasonable precautions in order for the Department to justly construct a case against the alleged violator. Fed. Corp., supra.

In the instant case, the Division did not adequately demonstrate that the Respondent failed to exercise reasonable precautions when the Respondent excavated at 173 Oliver Street, in Boston.<sup>3</sup> Accordingly, the Department finds that the Respondent did not fail to exercise

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<sup>2</sup>(...continued)

Department will not address this issue.

<sup>3</sup> Although the Division failed to produce evidence sufficient to show that the Respondent did not use reasonable precautions, the unique nature of the location of the underground facilities in this case (i.e., directly over each other) may also have led the Department to the conclusion that the Respondent could not have known of the existence of the "lower" facilities from the Company's markings and prevented damage to those facilities. The Respondent's testimony that a Company employee informed the Respondent that  
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reasonable precautions when excavating on June 13, 1991 at 173 Oliver Street, in Boston, Massachusetts, and therefore, did not violate the Dig-Safe Law.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Brockton Excavating Contractors, Inc. did not violate the Dig-Safe Law during excavation on June 13, 1991 at 173 Oliver Street, in Boston; and it is

ORDERED: That the NOPV against the Respondent be and is hereby Dismissed.

By Order of the Department,

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<sup>3</sup>(...continued)

no further facilities existed in the area of excavation is of concern to the Department, as it was in direct conflict with the actual location of those facilities. In the future, the Department may inquire into whether a company had the ability to locate such facilities and was responsible for making an excavator aware of those facilities.